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No. 125.

Supreme Court of the United States.

OCTOBER TERM, 1903.

CHAS. L. WEDDING and LOUIS I. AHLERING, Plaintiffs in Error,

vs.

ROMANZA JEROME MEYLER, . . . Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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Attorney for Defendant in Error.

[illegible] PRESS, LOUISVILLE, KY.

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CHAS. L. WEDDING AND
LOUIS I. AHLERING, ... *Plaintiffs in Error,*

vs.

ROMANZA JEROME MEYLER . . . . *Defendant in Error.*

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

On the 27th day of May, 1896, plaintiffs in error instituted their action at law against the defendant in error, in the Superior Court of Vanderburg County, State of Indiana, and on the same day summons was served on defendant in error by the sheriff of that county (Record, pages 9 and 10).

At the June term, 1896, of the Superior Court of Vanderburg County, Indiana, defendant in error by attorney moved to quash the summons issued in this action, which was overruled, and defendant in error was ordered to file his answer by Monday, June 15th, 1896, and the answer by attorney for defendant was filed on the date above named (Record, pp. 10 and 11).

On the 16th day of September 1896, this action, by consent of parties, was set for hearing in the Superior Court of Vanderburg County for October 5th, 1896, and on that day

defendant in error, by his alleged attorney, submitted this action to the court for trial, without the intervention of a jury, and the court, having heard the evidence and being duly advised in the premises, rendered judgment in behalf of the plaintiff in error against the defendant in error. (Record, p. 15.)

On the 19th day of October, 1896, plaintiffs in error instituted their action in the Warren Circuit Court, State of Kentucky, against the defendant in error, on the judgment rendered in the Superior Court of Vanderburg County, State of Indiana, and made the same an exhibit appended to and made part of their petition (Record, pp. 1 and 2).

Defendant in error filed his answer to this action, on the 21st day of November, 1896, in the Warren Circuit Court, in which he stated that he was a citizen of the State of Kentucky, and at no time was he ever a citizen or resident of the State of Indiana; that no summons had been served on him in the State of Indiana; that he had not entered his appearance or authorized any attorney to enter his appearance in the Superior Court of Vanderburg, State of Indiana; that the said Superior Court of Vanderburg County, State of Indiana, was without jurisdiction to render judgment against him, and that the judgment sued on was void, and of no binding force or effect, because said court had not, and did not acquire jurisdiction of his person, by the service of a valid summons within the territorial limits of Indiana.

At the February Term of the Warren Circuit Court, State of Kentucky, plaintiffs in error filed their reply to the answer of the defendant in error, which traversed the answer (Record, pp. 7 and 8). Plaintiffs in error, at this February Term of the Warren Circuit Court, filed their amended petition, in which they aver that by a mistake they failed to file with their original petition "a true copy of the record in the

action of Wedding, etc., vs. Meyler, in the Superior Court of Vanderburg County, at Evansville, Indiana," and that they now file and make part of their amended petition a complete and true record of the suit in said Superior Court of Vanderburg County, Indiana, and make the same a part of their amended petition (Record, pp. 8 and 9).

Further pleadings in this action between the parties were filed in the Warren Circuit Court to make up the issues as required by the Kentucky Civil Code of Practice (Record, pp. 14–18).

At the May Term of the Warren Circuit Court, issues being joined, a trial by jury was had, to make special findings upon the following questions propounded by the court, to wit:

(1) When the summons in this case was served upon the defendant Meyler upon the Ohio River, was said Meyler on the Indiana or Kentucky side of the low water mark where it touches the Indiana shore?

(2) Did the defendant Meyler authorize J. R. Williamson to represent him as his attorney, for any purpose, in the Superior Court of Vanderburg County, Indiana, in the suit of Wedding, etc., vs. R. J. Meyler—if so, what was the nature and extent of the authority thus given?

The jury answered to question 1 that the summons was served on the Kentucky side of the low water mark.

Answer to question 2.—"We do not believe that R. J. Meyler authorized J. R. Williamson to represent him as county attorney (Record, p. 20)."

Plaintiff in error moved the court for a judgement notwithstanding the verdict, which motion was sustained, and a judgment entered in the Warren Circuit Court, State of Kentucky, against the defendant in error, for the amount sued for and all costs (Record, p. 21).

Motion and grounds for a new trial were duly filed in the Warren Circuit Court and overruled, and thereupon defendant in error excepted and prayed an appeal to the Court of Appeals of the State of Kentucky, which was granted (Record, pp. 82 and 83).

A bill of exceptions was tendered, duly signed and enrolled, and thereupon the cause was removed to the Court of Appeals of Kentucky (Record, pp. 83 to 87).

The Court of Appeals of Kentucky, in November, 1899, reversed the judgment of the Warren Circuit Court (see opinion, Record, pp. 40 to 48).

A petition for rehearing was filed in the Court of Appeals, and before action was had upon this petition the Court of Appeals, in recognition of the comity between States, allowed the Attorney-General of Indiana to appear and orally argue, before the Court of Appeals, this petition for a rehearing, and thereupon the petition was overruled.

At the May term, 1901, of the Warren Circuit Court, the mandate of the Court of Appeals was filed, which directed the Warren Circuit Court to render judgment on the verdict, dismissing the action, and for further proceedings consistent with the opinion herein (Record, p. 51). The plaintiffs in error offered to file their amended petition in the Warren Circuit Court, in which, for the first time, they endeavored to set up the provisions of the Federal Constitution and the Federal Statutes, and the compact between the State of Virginia and the State of Kentucky, approved December 18th, 1789, which was denied, and to which ruling of the court, the plaintiffs in error at the time objected and excepted, and time was given them in which to prepare a bill of exceptions, and on the 20th day of the May term, 1901, a bill of exceptions was tendered the court by the plaintiffs in error, and the court having examined and approved such bill of excep-

tions, and finding the same to be true, signed it and directed that it be made part of the record in this case (Record, pp. 49 and 50).

On the 24th day of the May term, 1901, of the Warren Circuit Court, and after the bill of exceptions of the plaintiffs in error had been signed and sealed and an appeal granted to the Court of Appeals of Kentucky, the Warren Circuit Court entered the following order:

> "It is now ordered that the plaintiffs in this cause, for the purpose of an appeal to the Supreme Court of the United States, shall execute bond in the sum of two thousand dollars, with good and sufficient surety" (Record, p. 50).

The judgment of the Warren Circuit Court, in pursuance of the mandate of the Court of Appeals dismissing plaintiffs' petition, recites all the matters set up and pleaded in the amended petition of plaintiffs which had been tendered and refused by said court, and an appeal granted to the Court of Appeals (Record, p. 51).

Defendant in error objected to so much of the foregoing judgment as recites the grounds upon which plaintiff was given judgment against the defendant by this court, and the grounds and reasons for refusal of the judgment by the Court of Appeals, as does more than obey the mandate of the Court of Appeals, and defendant excepts and prays an appeal to the Court of Appeals (Record, pp. 51 and 52).

Plaintiffs in error bring, by this writ of error, directed to the Warren Circuit Court, its judgment for review by this court (Record, pp. 53, etc.).

ARGUMENT.

Proposition 1. Are plaintiffs in error entitled to a writ of error from this court to the Warren Circuit Court of the State of Kentucky, to review the judgment rendered in that court, dismissing the suit of the plaintiffs in error?

Proposition 2. Does this record present any Federal question which was specially set up or claimed by the plaintiffs in error, and which was decided by the highest court of the State?

Proposition 3. Has the State of Indiana concurrent jurisdiction with the State of Kentucky over the Ohio River, under any provision of the compact of December 18, 1789, of Virginia with Kentucky?

Under the first proposition, it is maintained by defendant in error, that this court is without power to review the judgment of the Warren Circuit Court, for the reason that the judgment rendered in that court was not final. Plaintiffs in error offered to file an amended petition, which was denied and in which, for the first time, they especially set up and claimed rights under the Federal Constitution and the Federal Statutes, as well as under the compact between Virginia and Kentucky of December 18, 1789.

Plaintiff in error prayed an appeal and tendered a bill of exceptions, which was duly signed and enrolled by the judge of the Warren Circuit Court.

The rule in Kentucky is, that although a case has been decided by the Court of Appeals of Kentucky, upon its return to the trial court it is competent to amend the pleadings and set up a wholly different cause of action, and to transfer it under the amendment from an action at law to a suit in equity, notwithstanding the decision and the mandate of the

Court of Appeals. Hillerich & Son vs. Franklin Ins. Co., 23 Ky. L. R. 631; s. c. 63 S. W. Rep. 592; Hord vs. Chandler, 10th B. Mon. 403.

This rule has prevailed in Kentucky since the adoption of the code of practice.

In Fisher vs. Perkins, 122 U. S. 527, Mr. Chief Justice Waite, in delivering the opinion of the court, said:

> "So, here, if an application to the Superior Court for an appeal had been refused, the doors of the Court of Appeals would have been closed against the suit, and we should have proceeded accordingly. As it is, we find nothing in the record to show that the suit could not have been taken to the Court of Appeals if the necessary application had been made, and consequently we have no right to proceed. It matters not that the judgment of the Superior Court is in accordance with what was decided by the Court of Appeals on a former appeal—the judgment is still a judgment of the Superior Court, which is not the highest court of the State, and it might have been taken to the Court of Appeals for review if the grant of an appeal had been applied for and secured. (McComb vs. Com'rs of Knox Co., 91 U. S. 1; Kimball vs. Evans, 93 U. S. 320; Davis vs. Crouch, 94 U. S. 514-517.) We are not to assume that an appeal would not have been granted if applied for."

This decision was rendered on a writ of error from this court to the Superior Court of the State of Kentucky to review a judgment of that court, and the rule laid down in the opinion rendered by the Chief Justice is applicable to this writ of error. The difference between this case and Fisher vs. Perkins is in this, that the plaintiff in error prayed an appeal to the Court of Appeals of Kentucky, which was granted, and the bill of exceptions tendered by the plaintiffs in error was duly signed and enrolled by the judge of the Warren Circuit Court. It is manifest, therefore, under the

repeated decisions of this court, that it is without jurisdiction on this writ of error to review the judgment of the Warren Circuit Court.

Downham vs. Alexandria, 9 Wallace, 659;
Gregory vs. McVeigh, 23 Wallace, 294;
Mullen vs. Western Union Beef Co., 173 U. S. 116;
Finney vs. Nelson, 183 U. S. 144.

This is the last decision found in which a writ of error was sued out from this court to an inferior court of a State, and it was stipulated that it was the highest court in the State of California to which the action could be taken, and the question of the jurisdiction of this court was not raised.

Under the second proposition, it is contended in behalf of the defendant in error, that the record presents no title, right, privilege or immunity that was specially set up or claimed by the plaintiffs in error, and which was passed upon by the Court of Appeals of Kentucky.

In Oxley Stave Co. vs. Butler County, 166 U. S. 653, Mr. Justice Harlan, delivering the opinion of this court, said:

"This court may re-examine the final judgment of the highest court of a State when the validity of a treaty or statute or an authority exercised under the United States is 'drawn in question,' and the decision is against its validity; or when the validity of a statute, or of an authority exercised under any statute is drawn in question, on the ground of repugnancy to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity; but it can not review such final judgment, even if it denied some title, right, privilege or immunity to the unsuccessful party, unless it appears from the record that such title, right, privilege or immunity, was 'especially set up or claimed' in the State Court, as belonging to such party under the Constitution or some treaty, statute, commission or authority of the United States."

In Louisville & Nashville R. R. vs. Louisville, 166 U. S. 714-715, Mr. Chief Justice Fuller, in delivering the opinion of the court, said:

"This record does not disclose that any Federal question was specifically raised in the Court of Appeals, and the sole reference in the opinion to constitutional objections is in the language above quoted. Doubtless that reference was by way of answer to the contention that the State might fail altogether unless construed to include railroad companies."

In Powell vs. Brunswick Co., 150 U. S., we said:

"As many times reiterated, it is essential to the maintenance of the jurisdiction, upon the ground of erroneous decision as to the validity of a State statute, or a right under the Constitution of the United States, that it should appear from the record that the validity of such statute was drawn in question as repugnant to the Constitution, and that the decision sustained its validity, or that the right was especially set up or claimed, and denied. If it appear from the record, by clear and necessary intendment, that the Federal question must have been directly involved, so that the State court could not have given judgment without deciding it, that will be sufficient; but resort can not be had to the expedient of importing into the record the legislation of the State as judicial in its character, and holding the validity of such legislation to be drawn in question and a decision necessarily rendered thereon, in arriving at conclusions upon the matters actually presented and considered. A definite issue as to the validity of the statute or the possession of the right must be distinctly deducible from the record, before the State court can be held to have disposed of such a Federal question by its decision."

And the Chief Justice in delivering his opinion, refers to the opinion of Mr. Chief Justice Harlan, delivered at the same time in Oxley Stave Co. vs. Butler Co., *supra*.

The provision of the United States Constitution, Article 4, section 1, that "Full faith and credit shall be given in each State to the judgments of another State", does not prevent an inquiry into the jurisdiction of the court rendering the judgment, over the parties and subject-matter, nor as to whether the judgment is impeachable for fraud.

In Grover & Baker Sewing Machine Co. vs. Radcliffe 137 U. S. 287, Mr. Chief J. Fuller said:

> "It is settled that notwithstanding the provision of the Constitution of the United States which declares that full faith and credit shall be given in each State to the public courts, records and judicial proceedings of every other State (Article 4, section 1), and the act of Congress passed in pursuance thereof (First Statutes 22, Rev. Stat., Section 905), and notwithstanding the averments in the record of the judgment itself, the jurisdiction of the court by which a judgment is rendered in any State, may be questioned in collateral proceedings; that the jurisdiction of a foreign court over the person or subject matter embraced in the judgment or decree of such court is always open to inquiry; that in this respect the court of another state is to be regarded as a foreign court, and that a personal judgment is without validity if rendered by a state court in an action upon a money demand against a non-resident of a State, upon whom no personal service or process *within the State* was made, and who did not appear.
>
> Cole vs. Cunningham, 133 U. S. 107.

The State courts of Kentucky did not question the power of the Indiana court; it merely tried the question of its jurisdiction over the person of Meyler, which depended upon two facts tried by jury, viz.:

(1) "Was Meyler on the Indiana or Kentucky side of the low water mark" of the Ohio River when the summons was served upon him? (2) Did Meyler authorize Williamson to represent him in the Indiana court?

The jury found as facts (1), that Meyler was "on the Kentucky side of the low water mark"; and (2) that he did not authorize Williamson to represent him.

Whether Meyler was on the Indiana side or the Kentucky side of the low water mark of the river does not appear from the record of the Indiana court, and that jurisdictional fact was open to inquiry in the Warren Circuit Court of Kentucky, upon the judgment rendered in the Superior Court of Vanderburg County, Ind., as a court, or to the authentication of its record under the Act of Congress. The Kentucky courts merely tried the question of facts, the existence of one of them being absolutely necessary to give the Indiana court jurisdiction to render this money judgment. The question of process or appearance, one of which is essential to jurisdiction, is open to inquiry in all judgments, whether domestic or foreign. If a judgment is restricted within the limits of the jurisdiction of the court, a valid service of the summons must, *ex necessitate*, be had within that jurisdiction. A service of process beyond the jurisdiction of the court is, therefore, no service.

The question that was tried by the pleadings of the Kentucky court was simply one of fact—jurisdiction. No question as to the failure by the court to give full faith and credit to the judgment was presented by the pleadings, and none properly could have been presented under that defense which went to the very root of the question, to wit, the right of the Indiana court to give any judgment for want of jurisdiction over the person of the defendant in error. The Kentucky court had only that question before it; the plea of payment was properly stricken out, because it had nothing to do with the case. If the Indiana court had jurisdiction the judgment was conclusive for the amount named therein; if it did not have jurisdiction of the defendant, the judgment was a

nullity. The mere question of fact as to whether the defendant was or was not at a certain place at a certain time, or whether he authorized a lawyer to represent him, certainly presents no Federal question of law.

Third. Has the State of Indiana concurrent jurisdiction with Kentucky over the Ohio River?

Virginia, under the colonial charter claimed title to all the country northwest of the Ohio River, in which are the States of Ohio, Indiana, Illinois, Michigan and Wisconsin. As a matter of history, this vast territory, at that time the extent of which was in a measure unknown, was traced by Virginia from the first grant to Thomas Gates and others by Great Britain, in 1606, and it was also claimed under the new and enlarged charter of 1609 given by Great Britain to the first colony, wherein was granted to the "Treasurer and Company of Adventurers and Planters of the City of London for the First Colony of Virginia," absolutely, the lands extending along the sea coast four hundred miles and into the lands throughout from sea to sea.

In 1624, by judgment of the Court of King's Bench on a writ of *quo warranto*, the grant of this vast domain claimed under the charter was annulled so far as the company was concerned, and reinvested in the crown the title to the lands in its limits. Thus the title to the territory within the Virginia charter stood at the time of the declaration of independence. England had held the title by discovery; it had granted it to the colony in absolute property, and the title had been reinvested in the crown by a judgment of court.

Upon the declaration of independence, the colonies found themselves asserting their independence and at the same time in possession, at least nominally so, of a territory the extent of which they, themselves, scarcely knew. To whom did it belong? The colonies theretofore chartered

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were earnest and eager in asserting peremptory rights to this domain. In 1779 the colony of Virginia opened an office for the sale of lands within charter limits. She claimed the right to this because of her colonial charter. Other colonies set up claims on the same ground; in some instances in conflict with that of Virginia, and not infrequently with those of each other. Maryland, from the first insisted that on the declaration of independence this domain was of right the property of all, since all were engaged in a war against the power which had previously owned them; that all must bear the burden of the price they were paying for independence, and, therefore, these vacant lands should be for the common benefit.

Thus the elements combined for the independence of the colonies were divided upon their respective individual interests. The historians correctly say that this was one of the most critical periods in American history. This controversy threatened the dissolution of confederacy. The articles of a confederation were seeking ratification, and the interest derived from the charter rights granted by Great Britain was standing in the way, retarding the final consummation of the Union, and sowing a discord among the colonies seeking independence which encouraged the enemies of the colonies.

Congress appealed to the States on the subject of the cession of the disputed territory, representing to them "how indispensably necessary it is to establish the federal union on a fixed and permanent basis, and on principles acceptable to all its respective members; how essential to public credit and confidence, to the support of our army, to the vigor of our councils and the success of our enterprises, to our tranquility at home and our reputation abroad; to our very existence as a free, sovereign and independent people" (10th Henning's Stats. 562).

These appeals were followed by a resolution adopted in October, 1780, by which Congress pledged itself that if the colonies would cede the disputed territory to the general government, it would dispose of the lands ceded to it for the use and benefit of all the members of the federation; that all these ceded territories should be formed into States and that these States should be admitted into the Federal Union with the same rights of sovereignty freedom and independence as the other States (3rd Journal of Congress, 535). Thus was the voice of conciliation heard in Congress and spoken to the colonies when conciliatory measures were necessary. The justness of the claims of the contesting colonies was conceded, but they were asked to sacrifice them for the common good. This proposition was accepted. In January, 1781, Virginia passed an act, authorizing, upon certain conditions, the cession of the territory northwest of the Ohio River. These conditions were not acceptable to Congress, which recommended certain changes. In 1783 Virginia accepted the amended conditions and passed an act confirming each and all of them, and instructing her delegates in Congress to make the cession (11th Henning's Stats. 526). This cession of Virginia, especially recites the resolution of Congress of 1780, and makes it the ground and condition of the deed.

New York had already ceded. Massachusetts followed Virginia in 1785. In September, 1786, Connecticut authorized her delegates to make a cession.

This act of the General Assembly of Virginia, in 1783, granting to the general Government all her right, title, claim and interest in and to the territory to the northwest of the Ohio, divested the colony of all title which it claimed under the colonial charter granted by the crown of Great Britain, and the title to and the ownership of this vast domain was

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permanently vested in the general government for the benefit of all.

Whether the title of Virginia was good is not a matter of importance. The general government assumed title and ownership and maintained it with the sword; so that, upon the conclusion of the war and the establishment of the general government under the Constitution of 1787, this domain was carved into States and at different times duly admitted into the Union.

As Chief Justice Marshall said, in Wallace vs. Parker, 6, Peters, 313, "Congress, by accepting the cession, admitted the right to make it, and that right," continues the Chief Justice, "has never been questioned."

The cession by Virginia of this territory in the compromise, as above stated, was possessed of all the solemnities of legislative action in all its parts. It was, in all of its elements, a compact between Virginia and the general government, of a most permanent and enduring character; and whenever any question originating in right, title or interest to property contained within this territory northwest of the Ohio was litigated before the courts, either State or federal, the conditions and stipulations contained in the deed of cession, have been uniformly observed and enforced.

Without further elaboration of the historical features of this cession of the territory of the northwest to the general government, reference is made to the

Constitutional History of the United States by Curtis, Volume 1, pp. 86, etc.;

Bancroft's History of the Constitution of the United States, Vol. 2, Chap. 6, pp. 98 to 118;

The Life and Times of James Madison, by Rives, Vol. 1;

The Critical Period of American History, by John Fiske;

Randall's Life of Jefferson;

Marshall's History of Kentucky, Vol. 1, p. 160, and the scholarly address of Judge Alexander P. Humphrey, of Kentucky, before the Alumni of the University of Virginia, July 2, 1884;

History of the People of the United States, by McMasters, Vol. 2, p. 477;

History of the U. S. Courts in Kentucky, by Thos. Speed, pp. 1 and 2.

On the 18th day of December, 1789, when Virginia gave her consent that Kentucky might organize and apply for admission into the Union of States, all of the territory northwest of the Ohio had theretofore been ceded by Virginia to the general government, and Virginia had no title or claim of ownership, nor did she assert any, to any part of the territory ceded in 1780 and 1783 to the general government.

Ohio was admitted into the Union as a State in 1802; Indiana, in 1816, and Illinois, in 1818. Neither Ohio nor Illinois claimed concurrent jurisdiction over the Ohio River at the time of their admission into the Union nor immediately thereafter. In the first Constitution of Illinois there was no claim made to the right of concurrent jurisdiction with Kentucky over the Ohio River. There never has been any such claim by Ohio, either in her Constitution or in her general laws.

Indiana was admitted into the Union under an act of Congress which fixed and established the boundaries within which the State government thus created was to exercise its sovereign rights and powers, and the compact of Virginia with Kentucky was in no manner connected therewith. In other words, Indiana derives its power as a State from its admission into the Union under the act of Congress, and not from the compact between Virginia and Kentucky, of 1789

Indiana, however, in her Constitution of 1816 and in her amended Constitution, by Article 14, claims concurrent jurisdiction with the State of Kentucky over the Ohio River, and this claim is founded on the 11th section of the compact of Virginia with Kentucky, of December 18th, 1789, and which is as follows:

> "That the use and navigation of the river Ohio, as far as the territory of the proposed State, or the territory which shall remain within the limits of this Commonwealth, lies thereon, shall be free and common to the citizens of the United States; and the respective jurisdictions of this Commonwealth and of the proposed State on the river, as aforesaid, shall be concurrent only with the States which may possess the opposite shores of said river."

More than six years after the cession of the Northwest Territory, Virginia passed this act, to allow the District of Kentucky to adopt a Constitution and become an independent State. This act of the Virginia legislature was ratified by Kentucky, and thereupon the Congress of the United States, by appropriate legislation, gave its consent to the admission of the district as a member of the Union of States. This act is known as the "Compact between Virginia and Kentucky."

It will be observed that this was a transaction wholly between the States of Virginia and Kentucky. It referred solely and exclusively to the territory which belonged to Virginia alone, and no one was a party to the transaction except these two states.

It is not denied that under the provisions of the Constitution, Congress had to give its consent to the admission of Kentucky into the Union, which it did without any reference to the terms of the compact between the two States.

Mr. Chief Justice Taney, referring to this compact, in State of Penna. vs. Wheeling, etc., Bridge Co., 13 Howard, 583, with reference to the clause in regard to navigation of the Ohio River, expresses himself thus:

> "This compact between Virginia and Kentucky in relation to the navigation of the Ohio, was one of the articles of agreement under which Virginia consented that Kentucky should become a separate State. Kentucky could not become a separate State without the consent of Congress, but the act of Congress which gave the consent, makes no reference whatever to the terms of the agreement between the States. It does not make the United States a party to them, nor guarantee their execution."

This compact, it will be observed, was a matter between Virginia and Kentucky, and necessarily could not affect "the States" that possess "the opposite shores," in the least, unless they chose to accept the privilege which its terms conferred. The fact that the compact declares that the jurisdiction of the Ohio River shall be concurrent with the States on the opposite shores, would confer no jurisdiction on the courts of such States when formed, because that could only be done by the legislative power of such States.

Indiana claims concurrent jurisdiction in her Constitution and legislative acts, which undertake to give her courts jurisdiction beyond the territorial limits of the State. It is settled by the decisions of this court, that the territorial limits of Kentucky are to low water mark on the north side of the Ohio River.

Hanley's Lessee vs. Anthony, 5 Wheaton, 474;
Garner's Case, 3 Grattan, 565;
Fleming vs. Kenney, 4 J. J. Marshall, 158;
McFall vs. Commonwealth, 2 Metcalf (Ky.), 394;
Louisville Bridge Co. vs. City of Louisville, 81 Ky. 194;
Indiana vs. Kentucky, 136 U. S. 479.

Indiana also has numerous decisions of the Supreme Court to the same effect. In Simpson vs. Butler, 4th Blatch. 284, the court said:

> "The State of Virginia, being the proprietor of the lands on both sides of the river, ceded to the United States the right to the territory situate, lying and being to the northwest of the river Ohio. It is decided that under this grant the ordinary low water mark of the river is the boundary of the territory granted, and we are of the opinion that when the United States or any of her grantees convey any of the lands on the river Ohio, without a special contract to the contrary, the same mark must be considered as the boundary of the grant."
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> Cowden vs. Kerr, 6 Blatch. 280.
>
> Carlisle vs. State, 32 Ind. 56.
>
> Sherlock vs. Alling, 44 Ind. 191.

The State of Indiana claims unto herself the right, upon the ground that the compact between Virginia and Kentucky allows the states on the opposite shore to exercise concurrent jurisdiction over the Ohio River, and has by her constitution asserted such jurisdiction, and by her legislation provided for its exercise by allowing the courts of the counties bordering on the Ohio to take cognizance of causes arising on the Ohio River opposite their southern boundary.

The case of Carlisle vs. the State, *supra*, was decided under this provision, and it was there held that although the offense was committed beyond the territorial limits of the State, yet, by reason of this provision, the Court of the County whose territory abutted on the river opposite the point where the offense had been committed, had jurisdiction.

Sherlock vs. Alling, *supra*, was a case in which the jurisdiction of the case was acquired by reason of statutory provisions of the State. It will be observed that in this case the jurisdiction was acquired by virtue of the statutory provision

alone. If there is any efficiency in the provision of the compact, Indiana is in a position to take advantage of it.

It is to be observed that the claim of concurrent jurisdiction between two sovereign states over the same territory, where the territorial limits of each is defined, is a thing wholly unknown to the laws of nations as we usually understand their terms, and has grown up under what has been termed in the United States, "interstate law." (Rorer, Interstate Law, 3.)

Generally, where States have provided by constitutions and laws for concurrent jurisdictions over streams which form the boundary between two or more States, it originates purely in a question of convenience, and where one State owns the territory covered by the river to the middle of the main channel, in some instances such State has jurisdiction over the whole stream, concurrent with the State or States on the opposite shore. This is provided by the concurrent action of the legislatures of both States. There is reason for such provision for concurrent jurisdiction where the middle of the stream is the boundary line between two States; for it would, no doubt, in many cases be absolutely impossible to ascertain whether the cause of action had arisen in one State or the other, when the circumstances out of which it grew had taken place at or near the center of the stream. But, however reasonable such provisions are between States whose territorial limits are at the middle of the stream, they wholly fail in reasonable application where it is sought to apply them to States which have a visible mark as a line of boundary, as low water mark on one side of the stream. The middle of the river can only be ascertained by measurement, and then there is no way of fixing it for future reference; but a line upon the shore, as low water mark, is not subject to this inconvenience to the same extent.

This concurrent jurisdiction over rivers which form the boundary between States is maintained largely if not entirely upon the idea of convenience, and this idea is advanced with great power by Judge Hobson, of the Court of Appeals of Kentucky, in his dissenting opinion, which is to be found in this record by stipulation of both parties hereto.

But what are the advantages to be derived by concurrent jurisdiction? There may be, and doubtless always will be inconveniences in the execution of laws near every boundary line between States, because of the fact that evil-doers will make their escape across the boundary line, and necessitate extradition proceedings in order to apprehend them. Parties will often make contracts in one State to be executed in the other, which will give rise to questions of the conflict of laws, etc. But these are difficulties which will arise near all boundary lines, and are not evaded or rendered less inconvenient by the concurrent jurisdiction of two States over a mere strip of territory in which the true boundary line is located.

No advantage, therefore, it is conceived, would be gained by concurrent jurisdiction over the stream, when low water mark on the one side is the boundary line between two States owning the land on the opposite sides of such river; and when it is considered that the States thus situated with reference to the river that have provided for such jurisdiction own to the middle of the stream, and have resorted to the provisions for such jurisdiction only because it is a less evil than the inconvenience of ascertaining the true line, we feel they are driven to the conclusion that now exists.

But, when we consider the disadvantages which must necessarily attend this concurrent jurisdiction, and when the anomalies which it produces in the law, and the absolute evils to which it gives rise, are taken into consideration, it

must be apparent that they greatly outweigh any advantages which a certain pride might induce and the claims which are gained by it.

It is believed that concurrent jurisdiction, in a strict sense, of two independent States over the same territory, is manifestly impossible. The idea of concurrent jurisdiction between two States involves the necessity that a set of facts which would form the ground of an action in the courts of one State, would also always form the basis of an action in the other. Now this can never be the case where the two courts administer different laws, make different applications of the same laws, and have different forms and modes of procedure in administering justice in general. This is the actual condition of things with many of the States of the American Union. What is a cause of action in one State may not be a cause of action in another State; what is a crime in one State may not be a crime in another; what is lawful in one may not be lawful in the other. Therefore, in a territory over which the courts of two States are said to have concurrent jurisdiction, it will oftentimes happen that one court will have jurisdiction while the other will not. There certainly can not, with any propriety, be said to be concurrent jurisdiction between two courts when one has no jurisdiction whatever.

Really, however, this does not touch the merits of the question under discussion. In those States which own the opposite sides of the stream to the middle of the channel, and have made legislative provisions for exercising concurrent jurisdiction over the whole river, it is held that concurrent jurisdiction does not apply to objects of a permanent nature, such as islands, bridges, docks and the like; for their position with reference to the true line of boundary can always be ascertained, and, therefore, the reason for concur-

rent jurisdiction fails as to them. All such structures and islands remain in the exclusive jurisdiction of the state in which they are situated (Rorer or Interstate Law, 337). Thus it was held that the State courts of Iowa had no power to remove a nuisance beyond the center of the Mississippi River, which consisted of a permanent dam of the river on the Illinois side.

Gilbert vs. Moline Water Power Co., 19 Iowa, 319.

Such permanent objects are taxable only in the State in which they are situated, and when the object is a bridge, the part of the bridge and the abutments which are in each State are there taxable (State vs. Metz, 5 Dutch. 122; Henderson Bridge Co. vs. Kentucky, 166 U. S. 150).

Indiana, by asserting her claim to concurrent jurisdiction over the Ohio River, could therefore acquire no jurisdiction over bridges and other structures of a permanent nature which are situated beyond low water mark, because, by all authorities on this question, they would remain in the exclusive jurisdiction of the State of Kentucky.

In addition to this, Kentucky has never yet acknowledged that Indiana has the right to extend her jurisdiction over the Ohio River, and when the State of Ohio claimed—or rather, when a citizen of Ohio undertook to defend his violation of the laws of the State of Kentucky on the Ohio River, Kentucky refused to recognize such defense, and dealt with the offender, as will be seen by an examination of the case of McFall vs. the Commonwealth (2 Metcalf (Ky.), 394).

The Supreme Judicial Court of Massachusetts held, in Commonwealth vs. Peters (12 Metcalf, 286), that an acquittal by a jury is no bar to a subsequent conviction for the same offense, when the court having first tried the case has no jurisdiction, and the court in which it is sought to plead the

former acquittal is to say whether the other court had jurisdiction or not.

And when it comes to the application of criminal and penal laws, many of the worst features of concurrent jurisdiction appear. In this there is no comity between States—each State enforces it own penal laws without reference to those of another. It may readily be conceived one may be convicted of a crime beyond the State in which the offense is committed, which is contrary to the obvious intention of Article 4, Section 2 of the Federal Constitution, providing for extradition. And again, there may arise the question in an alleged offense, that what is a crime in one state may not be a crime in the other; therefore, one may innocently commit a crime by doing an act in such common territory which would not be a crime in the State of his residence, with whose laws, in all probability, he would be more familiar. The same act may be visited with a much graver penalty in one State than in the other, and thus the punishment of a criminal might be great or light, according as he falls into the hands of one State or the other. For instance, in Indiana, all criminal prosecutions are under the statutes of the State. In Kentucky the prosecutions may be at common law or under the statute, as the case may be. Again, it may be stated that the stealing of a small amount in Kentucky constitutes grand larceny and is a felony, while in Indiana it requires the theft of a larger amount to constitute the offense of grand larceny. And again, rape, in Kentucky, is punishable with death, which may not be possible in Indiana. Detaining a woman against her will is a felony in Kentucky for which, upon conviction, a severe penalty is pronounced; in Indiana it may not be a crime, and if a crime, may not be punished as severely as in Kentucky. Shooting at another with intent to kill, doubtless is a felony in Indiana and also in Kentucky,

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but the degree of punishment may be lighter in Kentucky than in Indiana.

But beyond and above all, one may, when such concurrent jurisdiction exists, be convicted and punished twice for the same offense.

It has been claimed that where the court of one State has tried a person for an offense committed in a common territory, its judgment should be a bar to proceedings of the same character in courts of the other; but it was held in a case in Illinois that such is not the law. The crime for which the accused was sought to be tried had been committed on the Mississippi River, and the accused person had been tried and convicted in the courts of Iowa. The accused was afterwards brought to account for his crime in the Illinois court, and a transcript of the proceedings in the Iowa court was introduced as a bar to the suit. The Illinois court held, in Phillips vs. the People, 55 Ill. 429, that:

> "While it is true that a person shall not be subjected for the same offense to be twice put in jeopardy, yet a conviction and punishment in another State, for a crime against our own laws, can not, in any legal sense, constitute that jeopardy. . . . That the offense for which a conviction was had in the State of Iowa, can not be regarded as the same in law as that for which the party had been indicted in Illinois, and that the conviction is no bar to conviction here."

Then, again, the objectionable disadvantages to this claim of concurrent jurisdiction will be found in a number of instances to arise in regard to privileges and licenses which generally are granted by statutory authority of a State, and to which a penalty is attached for the non-observance. There is even less uniformity between the States in this than in criminal matters. In McFall vs. the Commonwealth,

Sayre, a justice of the peace, of Cincinnati, who was licensed to solemnize marriages in Ohio, was committed and punished for performing the marriage ceremony on a boat on the Ohio River, south of low water mark.

There is little, if any, uniformity in the statutory actions for causes in the nature of a tort in the two States, which will surely present anomalies in the law when this concurrent jurisdiction is asserted. For instance, when the statute of one State authorizes an action for an injury or death of a person, caused by the neglect of another, such action, of course, can not be maintained if the case arise beyond the limits of the state providing such action. When two States, for example, Kentucky and Indiana, have concurrent jurisdiction, a citizen of one State may not be able, under the laws of his own State, to maintain such action for an accident in the common territory, but he maintains such action in the other State. He thus has a privilege, which the laws of his own State, extending over the same territory, would not give. This was so held in Sherlock vs. Alling, 44 Ind. 191.

Other difficulties readily suggest themselves, and especially with regard to contracts and the validity of instruments, in which concurrent jurisdiction would give rise to many perplexing questions.

While Indiana provided by her Constitution and legislative enactments, and by virtue thereof asserts jurisdiction concurrent with Kentucky over the whole of the Ohio River, which forms the boundary between the two, the territory covered by the river would, for the purpose of the validity of contracts, be as much a part of Indiana as if she owned the territory—and it would also belong to Kentucky. If a deed were made on the Ohio River, according to Kentucky law, for a conveyance of land in Indiana, without the formality of seal or witness, as required by the Indiana Statutes, it would

certainly be void, for it would not be protected by the provisions of the statutes of Kentucky in regard to deeds made in another State. And with reference to commercial paper the statutes of 3rd and 4th Anne are in force in the State of Indiana, but have never been recognized or adopted in the State of Kentucky. Therefore, a note made on the Ohio River, south of low water mark and within the territorial limits of Kentucky, between A and B, would be a negotiable note in the State of Indiana, but would not be in Kentucky, in which latter State it would be a non-negotiable note; while in Indiana, the obligation, because of it having been made on the Ohio River, would be enforced under the statute of Anne. All promissory notes made in Kentucky are non-negotiable unless, according to the provisions of the general law of the State, they are made negotiable and payable at a chartered bank, state or national, and indorsed and actually discounted in bank.

To illustrate the anomalies which might arise upon this question of concurrent jurisdiction over the Ohio River between Indiana and Kentucky, the following supposed cases are presented: On any of the bridges spanning the Ohio River between Kentucky and Indiana, any offense committed on the bridge south of low water mark would be exclusively within the civil or criminal jurisdiction of the State of Kentucky, while the same offense, or the same civil contract, made on a movable object—for instance a water craft of any character, on the Ohio River, would be amenable to the laws of either State under this theory of concurrent jurisdiction. If an offense punishable by death is committed on any of the bridges spanning the Ohio River, between Kentucky and Indiana, south of low water mark, or upon any permanent structure south of low water mark in the Ohio River, or on any island in the Ohio River, the State of Kentucky alone

would have exclusive jurisdiction to punish the offender, and the courts of Indiana in those counties which abut on the stream opposite to which this offense was committed on the Ohio River, would manifestly be without jurisdiction. If a man standing immediately south of low water mark, on the Ohio River, with his footing upon the soil in the bed of the river, should wound or kill a citizen of Indiana immediately north of the low water mark in the Ohio River, in this state of case, which State abutting on the Ohio River would have jurisdiction of the offender?

In this supposed case, however, let the statement of facts be varied to this extent—that the person who wounds or slays his opponent, and the victim, were both standing in the water south of low water mark. Manifestly the courts of Kentucky would have exclusive jurisdiction, and the offender would be punishable under the laws of the State of Kentucky.

Again, in transportation on the Ohio River by steamboat, suppose passengers are killed outright by accident of navigation to the steamboat on the Ohio River, and the laws of Indiana provide that in case of death an amount is fixed for the death of a person, and no recovery in any action for damages can be had beyond the amount fixed by the statute. In Kentucky there is no limit whatever. Here, then, is presented another of the many anomalies that may be pointed out in the administration of the laws of the two States upon this theory of concurrent jurisdiction.

Suppose a horse is hitched to a post immediately north of low water mark, in the State of Indiana, with sufficient length of rein to enable him to get into the Ohio River south of low water mark, and a river thief or pirate comes along in a canoe and steals the saddle from the animal, in which State is the theft committed, and under the laws of which

can he be punished? In this last case the animal is unquestionably upon the soil of Kentucky, and he has a firm footing thereon in the bed of the river, south of low water mark. The post to which he is hitched is north of low water mark, and is unquestionably in the State of Indiana. The asportation unquestionably took place in Kentucky, while the reins of the horse, hitched to the post, are in the State of Indiana. Have the courts of both States concurrent jurisdiction?

It will therefore be seen that the doctrine of concurrent jurisdiction, founded upon convenience, wholly fails when the many inconsistencies are pointed out, as well as the great inconveniences which necessarily result from the enforcement of law, within territorial limits where the boundary is fixed and readily ascertained.

The attention of this court is also respectfully called to the opinion of the Court of Appeals of Kentucky, and the several authorities therein cited.

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